INDEX

TABLE OF CONTENTS

	Page
Opinion and Orders Below	2
Jurisdiction	2
Statute Involved	2
Questions Presented	2
Statement	3
Reasons for Granting the Writ	5
Conclusion	21
Appendix A—12 U.S.C. § 36	1a
Appendix B—Opinion and Order of the United States District Court for the Northern District of Georgia	5a
Appendix C—Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit	10a

TABLE OF AUTHORITIES

CASES:

American Courier Corporation v. The Wachovia Corporation, Civ. C-135-WS-70, M.D.N.C., filed, July 2, 1970	21
Camden Trust Co. v. Gidney, 301 F.2d 521 (D.C. Cir.), *cert. denied*, 369 U.S. 886 (1962)	10
Carson Naval Stores Co. v. United States, 29 F. Supp. 818 (S.D. Ga. 1939)	7
Dietrich v. Rothenberger, 25 K.L.R. 338, 75 S.W. 271 (Ky. 1903)	7
Dunn v. State, 79 S.E. 170 (Ga. Ct. App. 1913)	7

Page

First National Bank v. First Bank Stock Corp., 306 F.2d 937 (9th Cir. 1962) 14
First National Bank in Plant City, Florida v. Dickinson, 396 U.S. 122 (1969) ..... *passim*
Goldy v. Crane, 445 P.2d 212 (Colo. 1968) 14
In re application of Kenilworth State Bank, 49 N.J. 330, 230 A.2d 377 (1967) 14
Jackson v. First National Bank of Cornelia, 292 F. Supp. 156 (N.D. Ga. 1968) 3
Leuthold v. Camp, 273 F. Supp. 695 (D. Mont. 1967), *aff'd*, 405 F.2d 499 (9th Cir. 1969) 13, 16
Peoples Bank v. Banking Board, 436 P.2d 681 (Colo. 1968) 12
Ramapo Bank v. Camp, 425 F.2d 333 (2d Cir. 1970) .. 17
State v. Reid, 125 Mo. 43, 28 S.W. 172 (1894) 7
Wells Fargo & Co. v. Northern Pac. Ry., 23 Fed. 469 (C.C.D. Ore. 1884) 7

STATUTES:

12 U.S.C. § 24 (Seventh) 3
12 U.S.C. § 30 17
12 U.S.C. § 36 ..... *passim*
12 U.S.C. §§ 1841-1844 10
28 U.S.C. § 1254(1) 2
Ga. Code §§ 13-201 *et seq* 3
Ga. Code § 13-201.1(e) 10, 15
Ga. Code § 13-204.1 16
Ga. Code § 22-302 15
Ga. Code § 22-1402 15

MISCELLANEOUS:

Georgia Public Service Commission, Application for Class M Certificate, File No. 5 MCA-9665, Dkt. No. 4028-M (January 27, 1970) 20
Stevens, Corporations § 18, at 95 (1949) 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No.

FIRST NATIONAL BANK OF CORNELIA, CORNELIA, GEORGIA, *Petitioner*,*

v.

W. M. JACKSON, Superintendent of Banks of the State of Georgia

and

THE FIRST NATIONAL BANK OF GAINESVILLE, GEORGIA, ET AL., *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on September 9, 1970.

---

* William B. Camp, Comptroller of the Currency of the United States, was a Defendant-Intervenor below.

OPINIONS AND ORDERS BELOW

The opinion and order of the United States District Court for the Northern District of Georgia, dated January 23, 1970, dismissing petitioner's complaint for declaratory relief are not yet reported, and are printed as Appendix B hereto.

The opinion and judgment of the Fifth Circuit Court of Appeals, dated September 9, 1970, affirming the District Court's order are not yet reported, and are printed as Appendix C hereto.

JURISDICTION

The opinion and judgment of the Fifth Circuit Court of Appeals were rendered on September 9, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The statutory provision involved is 12 U.S.C. § 36. It is printed as Appendix A hereto.

QUESTIONS PRESENTED

1. Is an armored car messenger service owned and operated by a non-bank subsidiary of a holding company that also owns controlling stock in a national bank and in other non-bank businesses a "branch" within the meaning of 12 U.S.C. § 36?

2. Does not the District Court's order of January 23, 1970, affirmed by the Fifth Circuit Court of Appeals, improperly go beyond the scope of this Court's decision in *First National Bank in Plant City, Florida* v. *Dickinson*, 396 U.S. 122 (1969), and enjoin the operation of an entirely legal and permissible armored car messenger service?

STATEMENT

Petitioner, First National Bank of Cornelia, Cornelia, Georgia, began operating its own armored-car messenger service in November 1966. By 1970, the three armored cars operated by the bank were picking up and delivering funds to and from more than five hundred customers each week in parts of Georgia and North Carolina. The dollar value of these funds averaged $[illegible] to $[illegible] per day. It is not necessary to state in more detail the nature of this operation since, as will appear more fully below, the bank no longer owns or operates the cars or the service.

In October 1966, suit was filed by the Superintendent of Banks of the State of Georgia and a number of intervening state banks, seeking to enjoin petitioner from operating its armored car bank messenger service. The complaint alleged that this service constituted illegal mobile branch banking under 12 U.S.C. §§ 24 (Seventh), 36(c), (f), and Title 13 of the Code of Georgia, §§ 201 *et seq.* Petitioner answered and counterclaimed for an injunction and a declaratory judgment. The Comptroller of the Currency of the United States intervened as a defendant in support of petitioner. Following a hearing, the United States District Court for the Northern District of Georgia made findings of fact and permanently enjoined the bank, "it officers, agents, servants, employees and attorneys, and those persons in active concert or participation with them" from "engaging in illegal branch banking in the form of an off-premises armored car banking messenger service * * *." *Jackson* v. *First National Bank of Cornelia*, 292 F. Supp. 156, 161 (N.D. Ga. 1968).

On December 9, 1969, this Court held in *First National Bank in Plant City, Florida* v. *Dickinson*, 396

U.S. 122 (1969) (hereinafter cited as *Plant City*), that an armored car that picked up deposits from customers for delivery to a bank and that was owned and controlled by the bank itself was a branch bank under 12 U.S.C. § 36 and was thus illegal in states where branch banking is prohibited. The judgment in that case issued on January 19, 1970, when this Court denied a timely Petition for Rehearing.

On January 15, 1970, four days prior to the issuance of the judgment in *Plant City*, Petitioner ceased all operation of its armored car messenger service. On that day (and henceforth until January 25, 1970), the service was operated by an entirely separate company, The Parent Messenger Service Corporation. The majority stockholder in that corporation is The First National Cornelia Corporation, a holding company which owns approximately 88% of the stock. The remaining 12% of the stock is held by 17 other individuals or business entities. Both the subsidiary and the holding company have been incorporated in Delaware and qualified to do business in Georgia as foreign business corporations. The subsidiary operated the armored car service with its own employees, officers and directors. The only connection between the bank and the holding company's subsidiary is that the holding company also owns 88% of the stock of the bank.

In a good-faith attempt to determine its rights, petitioner, on January 13, 1970 (prior to the issuance of the *Plant City* judgment), filed a complaint for declaratory relief. On January 23, 1970, following a hearing on that complaint and on the application of respondent state banks to hold petitioner in contempt, the District Court issued its findings of fact, conclusions of law, and order (Appendix B). The order held the bank and

those acting in concert with it in contempt because of the operation of the armored car messenger service, even though the service had been operated since prior to the issuance of the *Plant City* judgment by an entirely different company and not by petitioner. The order enjoined not only the bank but the holding company, its armored car subsidiary, and all parties acting in concert with the bank directly or indirectly from operating such a service. And the order threatened to jail the bank's president if any armored cars operated between the bank and its customers subsequent to midnight January 25, 1970.

The United States Court of Appeals for the Fifth Circuit affirmed, holding that "to ignore the substance of the operation of the armored cars in this case and allow rolling branch banks to be provided 'on behalf of the bank' through the real or fictional largesse of a parent holding company, would illegally disrupt the competitive equality between federal and state banks in Georgia" (Appendix C).

REASONS FOR GRANTING THE WRIT

As shown more fully below, the opinion of the Court of Appeals for the Fifth Circuit is in conflict with results in at least two other circuits. In addition, we respectfully submit that the District Court and the Court of Appeals misread this Court's *Plant City* decision and 12 U.S.C. § 36; that the net effect of their rulings will be for major aspects of banking as they are now practiced in this country to cease or to change drastically, and that petitioner and the hundreds of customers who must have an armored car messenger service for their own protection will be irreparably damaged unless this Court grants certiorari and reverses the opinion and judgment below.

Section 36 U.S. Code Title 12, which this Court was interpreting in *Plant City*, makes it perfectly plain that it covers branches of banks and not facilities owned by non-banks. In fact, in this one section of the Code alone, Congress made clear no less than *twenty-seven times* that the branches it was defining and dealing with are branches *of banks*.[1]

Moreover, this Court made abundantly plain in its *Plant City* decision that it was defining branches *of banks*. It emphasized, for example, that the Florida bank owned and controlled the armored cars, the guards on the armored cars were bank employees, the bank assumed complete responsibility for the money on the

[1] "• • • [A] national banking association may retain or establish and operate a branch • • •" (§ 36); "A national banking association may retain and operate such branch • • •" (§ 36(a)); "• • • any national banking association • • • may continue to maintain and operate such branch" (§ 36(a)); "A national bank • • • may retain and operate as a branch any office which was a branch of the State bank • • •" (§ 36(b)(1)); "• • • a new branch of the resulting national bank • • •" (§ 36(b)(1)(A)); "• • • a branch of any bank • • •" (§ 36(b)(1)(B)) and twice in § 36(b)(2)(B); "• • • a branch of the resulting national bank" (§ 36(b)(1)(C)); "• • • if a State bank • • • would be prohibited • • • from retaining and operating as a branch • • •" (§ 36(b)(1) and § 36(b)(2)); "• • • branch of the national bank • • •" (§ 36(b)(1)); "A national bank • • • may retain and operate as a branch • • •" (§ 36(b)(2)); "a • • • branch office of any bank • • •" (§ 36(b)(2)(A)); "• • • a new branch of the resulting bank • • •" (§ 36(b)(2)(A); "a branch of the national bank • • •" (§ 36(b)(2)(C)); "• • • a branch of the State bank • • •" (§ 36(b)(2)); "A national banking association may • • • establish and operate new branches • • •" (§ 36(c)); "• • • in which State banks are permitted • • • to maintain branches • • •" (§ 36(c)); "• • • no such association shall establish a branch • • •" (§ 36(c)); "• • • the establishment of such branches by State banks • • •" (twice) (§ 36(c)); "• • • every national banking association and its branches • • •" (§ 36(d)); "• • • such associatilon and its branches • • •" (§ 36(d)); "No branch of any national banking association • • •" (§ 36(e)); "• • • the establishment by national banking associations of branches • • •" (§ 36(g)).

armored cars, and the cars bore the bank's name (396 U.S. at 128)—all of which facts are completely inapplicable to the armored car operation in which the holding company's subsidiary seeks to engage here. It is well settled that the mere performance of a bank-like act does not convert the performer into a bank or a branch.[2] There is nothing whatever in this Court's *Plant City* opinion casting doubt on this established precedent. This Court emphasized that the armored car operation there under consideration was a *bank* operation. The *bank* was receiving a deposit at the armored car which it owned and operated. The Court was *not* saying that any intended bank deposit, when presented to any conduit of whatever nature and description, converted the conduit into a bank or a branch bank.

Although the District Court below relied heavily on the erroneous assumption that this Court's holding in *Plant City* meant that the performance of a bank-like act automatically converted an ordinary business corporation into a bank, the Fifth Circuit Court of Ap-

[2] *Wells, Fargo & Co.* v. *Northern Pac. Ry.*, 23 Fed. 469 (C.C.D. Ore. 1884) (armored car company transporting money between businesses and banks *held* not to be a bank); *Carson Naval Stores Co.* v. *United States*, 29 F. Supp. 818, 821 (S.D. Ga. 1939) (Georgia factoring corporation that opened lines of credit for consignors, took promissory notes, and drew drafts against customers with credit accounts *held* not to be a bank); *Dunn* v. *State*, 79 S.E. 170, 172 (Ga. Ct. App. 1913) ("receiving money or securities on special deposit for safe-keeping is [a] function of a bank, but it does not follow that every such fiduciary is engaged in the business of banking"). A number of other courts have repeatedly made the same point. For example, in *State* v. *Reid*, 125 Mo. 43, 28 S.W. 172 (1894), a trust company which exercised some of the powers of a bank was still held not to be a bank, and in *Dietrich* v. *Rothenberger*, 25 K.L.R. 338, 75 S.W. 271 (Ky. 1903), a title company which exercised some of the powers of a bank was nevertheless held not to be a bank.

peals, faced with the many obvious distinctions between the facts in *Plant City* and those at issue here, responded by mechanically reiterating the legal truism that form should not prevail over substance, *e.g.*:

> Since the whole scheme of maintaining competitive equality between the national and State banking systems looks to substance not form, we affirm.
>
> • • • • • • • • • •
>
> [T]he Bank sought to do indirectly that which the district court had prohibited it from doing directly.
>
> • • • • • • • • • •
>
> In *First National Bank in Plant City* v. *Dickinson* * * * the Supreme Court made it quite clear that in determining whether activities by national banks violated the principle of "competitive equality" with State banks that form should not prevail over substance.
>
> • • • • • • • • • •
>
> Here, as in *Plant City*, we don't need to call a sham a sham.

Yet the armored car operation here is emphatically *not* a sham. The holding company, although it controls both the bank and the armored car subsidiary, is a very different economic as well as legal entity than either of its subsidiaries. When the holding company was being organized in January of 1970, potential stockholders were notified that the creation of a one-bank holding company would enable that entity:

> to meet directly the increasing competition of non-bank businesses which offer many services of a bank except for taking deposits. * * * In oder to be in a position to move immediately into these new financial service areas if an attractive possibility

to do so should arise in the future, it is desirable to reorganize now.[3]

Such an attractive possibility arose while the appeal to the Fifth Circuit was under advisement. On September 1, 1970, First National Cornelia Corporation, the holding company, acquired all the stock of Motor Finance Company of Cornelia, a small loan company specializing in retail automobile loans. It is anticipated that this loan company will return a net profit of between $20,000 and $40,000 per year. The expense of operating the three armored cars is estimated to be approximately $20,000 per year. Thus, the Fifth Circuit's statement that the armored car subsidiary "lived in the land where profit is the lifeblood of business by drawing fiscal sustenance from the Bank, using the holding company as its artery" is simply not accurate, because the armored car subsidiary can draw much of its sustenance from an economic enterprise completely distinct from the bank.[4]

However, even prior to this first acquisition of a small loan company, the District Court and Court of Appeals erred in their analysis of the legal status of the holding company, which had the potential, at any moment, of making such acquisitions—many of which are forbidden to banks themselves. It is totally inaccurate to characterize the difference between the bank and the holding company as a sham. Several examples

[3] Transmittal Letter to the Stockholders of the First National Bank of Cornelia, Georgia, January 14, 1970.

[4] The holding company might legitimately use income derived from dividends received from the small loan company to operate the armored car service because the armored cars would be helpful in transporting cash and checks from the small loan company to and from banks and customers.

illustrate the point. Thus, a corporation 100% of whose voting stock is owned by a single individual shareholder is still entitled to have its income taxed at corporate rates. The shareholder is also shielded from personal liability for acts by the corporation as long as all corporate formalities are observed. Also illustrative is the fact that both federal[5] and state[6] legislation specifically permit the operation of bank holding companies and specifically recognize their status as entities legally distinct from their subsidiary banks, even though at the time of their creation each holding company's only asset may be a bank. Finally, it is hornbook law that the corporate veil will be pierced only when "used to defeat public convenience, justify wrong, protect fraud, or defend crime."[7]

As a review of numerous federal and state cases indicates, the open and above-board use of the holding company form of organization has not been considered illicit under that standard even when the holding company controls two or more full-fledged banks in a state which prohibits branch banking. For example, in *Camden Trust Co. v. Gidney*, 301 F.2d 521 (D.C. Cir.), *cert. denied*, 369 U.S. 886 (1962), the Comptroller of the Currency refused to allow the Haddonfield National Bank to establish a branch in Delaware Township because the Camden Trust Company already had a branch there, and state law prohibited branches in any municipality where another bank already had a branch. Eight of Haddonfield's nine directors thereupon applied for the incorporation of a new national bank in

---

[5] 12 U.S.C. §§ 1841-1844.

[6] *E.g.*, Ga. Code § 13-201.1(e) (one bank holding companies permitted).

[7] Stevens, Corporations § 18, at 95 (1949).

Delaware Township. A competing bank argued that the application of the Haddonfield directors was "on its face a manifest subterfuge to circumvent the provisions and purposes of the National Bank Act by attempting to introduce into Delaware Township a banking facility that will for all practical purposes constitute a branch facility of the Haddonfield National Bank. Issue of a Certificate of Authority in such a case is contrary to law, beyond the defendant's authority, and a clear abuse of his discretion" (301 F.2d at 523).

The Court of Appeals disposed of this argument in language of particular applicability here:

> Whatever weight is to be given to the appellant's legal argument, it is difficult to think of the Haddonfield directors' action as a "subterfuge," at least in an invidious sense. On the contrary, the preliminary proceedings seem to have been open and notorious. Perhaps on that account the "subterfuge" was alleged to be "manifest." The president of the Haddonfield National Bank on its letterhead notified all of its shareholders of the plan and the objective which the directors sought. Appellant protested orally and in writing to the Comptroller. The latter and the New Jersey Bank Commissioner corresponded concerning the project. It fairly may be said that we perceive nothing arcane or wrongfully covert in the effort. The respectively zealous competitors really are at issue, we feel sure, solely as to whether or not the Comptroller in the circumstances shown is to be precluded by law from issuing a certificate of authority to the intervenor. * * * Haddonfield National Bank has not been shown to own the intervenor even if some of the stockholders and directors of the former should own some of the shares of the latter. The intervenor clearly is not a

> branch of Haddonfield but is a completely separate entity with certain distinguishing characteristics * * *. [*Id.* at 523-524; footnotes deleted."]

In the instant case, the officers, directors and stockholders of the bank were fully advised that the holding company would perform a number of valuable functions (which it does), including the operation, through a subsidiary, of an armored car service.[9] And the bank's suit for declaratory relief, which was filed even in advance of the issuance of the *Plant City* judgment, set forth fully and openly just what had been done and what the holding company's subsidiary proposed to do.

---

[8] Similarly, in *Peoples Bank* v. *Banking Board*, 436 P.2d 681 (Colo. 1968), the Supreme Court of Colorado thus stated the Peoples Bank's objection to an application for a state bank charter to be granted to the Guaranty Bank of Stapleton Airfield: "Peoples Bank contends that the granting of the charter violates the statutory prohibition against branch banking for the following reasons: Guaranty Bank and Trust Company, Denver, Colorado, through one of its executive officers, 'put together' the materials contained in the application; the stock ownership of both is the same and proportionately identical; the board of directors are the same; the chief executive officer is the same; the officers of the new bank come from Guaranty Bank and Trust Company; the working employees are to be furnished or trained by Guaranty Bank and Trust Company; and the accounting for the new bank is to be done by Guaranty Bank and Trust Company" (*id.* at 683). Despite these facts, the court concluded that "We view here nothing at variance with the statutory scheme which would invite piercing the corporate veil nor do we find facts present here which warrant exercise of such power of penetration" (*id.* at 684).

[9] Certificate of Incorporation of The Parent Messenger Service Corporation, Par. Third; Letter to the stockholders of the First National Bank of Cornelia from the bank's Board of Directors, January 14, 1970; Offering Circular to the bank's shareholders, January 14, 1970, p. 3.

Similarly, in *Leuthold* v. *Camp*, 273 F. Supp. 695 (D. Mont. 1967), *aff'd*, 405 F.2d 499 (9th Cir. 1969), a national bank (Daly) owned by a holding company (Northwest Bancorporation) proposed to acquire the assets of a second national bank (First of Butte) in exchange for stock of the holding company, consolidate the two national banks, and then maintain full banking facilities at both banks. The Montana Superintendent of Banks and various intervening state banks opposed the plan on the ground that this was branch banking, prohibited by state statute, and thus illegal under the federal Bank Holding Company Act. Another section of the state banking law allowed state banks that met certain conditions (including the consent of the state Superintendent) to consolidate and "maintain and operate offices in the locations of the consolidating banks." The court held that this latter section allowed the national banks to do what they did, even though it was another way of performing branch banking. In language that goes directly to the argument of the Fifth Circuit here, the court said:

> The court is asked to pierce the corporate veil and hold that since Northwest Bancorporation, by virtue of its ownership of Daly, will own the First of Butte, the Bank Holding Company Act is violated.
>
> There is no suggestion of fraud or deception. Rather the plaintiffs argue that because what is done in terms of real ownership is so like what is prohibited, that what is done likewise should be prohibited. Were the Act which applies here one passed in recognition of some community moral judgment, then a court might be tempted to, and might well look behind the corporate forms, to protect the basic social mos involved. Here, however, we deal with a regulatory measure designed to con-

trol the expansion of bank holding companies. There is no declaration that expansion is per se bad—only that each expansion must be evaluated in terms of its effect on the general public interest. The Act itself makes formal and perhaps arbitrary distinctions between asset and stock acquisitions. Under these conditions it is the court's opinion that it should not, by disregarding the corporate forms, abolish the distinctions that Congress created. [273 F. Supp. at 702."]

Many other cases are in accord."

The result in the Fifth Circuit simply cannot be squared with these cases in other circuits, and particularly in the District of Columbia and Ninth Circuits.

---

[10] "In an analogous situation, more than 50% of the stock of one bank, the Kenilworth State Bank, was owned by shareholders who also held more than 50% of the stock of another bank, the Union City Trust Company; five directors were common to both banks; the president of one bank was a former vice president of the other; and one bank's computer system and loan participation were available to the other bank. A competing bank argued that Kenilworth was merely a branch of Union City and therefore prohibited by state law. The Supreme Court of New Jersey rejected the argument and said: "[E]ven full common stockholdings and directorships do not, without more, convert an affiliated bank into a branch bank. Constitutional issues aside, the Legislature could have but did not prohibit an individual from being a stockholder or a director in more than one bank. Nor did it adopt any enactment aimed specifically at chain banking resulting from such common stockholdings and directorships. In view of the well-recognized distinctions between chain and branch, the legislative restrictions aimed specifically at branch banking should not be extended by the judiciary to banks which are independently structured and operated though affiliated." *In re application of Kenilworth State Bank*, 49 N.J. 330, 230 A.2d 377, 382 (1967).

[11] *E.g.*, *First National Bank* v. *First Bank Stock Corp.*, 306 F.2d 937 (9th Cir. 1962); *Goldy* v. *Crane*, 445 P.2d 212 (Colo. 1968).

The Fifth Circuit, the District Court, and respondent Superintendent of Banks of the State of Georgia have all sought to argue that petitioner, a national bank, would achieve a competitive advantage over Georgia state banks because Georgia law, although it permits one-bank holding companies, prohibits the operation of an armored car subsidiary of such a holding company controlling a Georgia state bank in the manner at issue here. In fact, Georgia law does *not* prohibit such operation.

Since First National Cornelia Corporation is not a "bank holding company" (as distinguished from a one-bank holding company) under Georgia law (Ga. Code § 13-201.1(e)), it is governed only by the ordinary business corporation laws of Georgia and not the state banking laws. The Georgia corporation law, § 22-1402, permits a foreign business corporation such as First National Cornelia Corporation "to enjoy the same • • • rights and privileges as a domestic corporation organized for the purposes set forth in the application pursuant to which [its] certificate of authority is issued." The certificate of authority issued to First National Cornelia Corporation by the Secretary of State of Georgia on January 12, 1970, authorizes that corporation to engage in any of the activities enumerated in its Certificate of Incorporation, so long as none of those activities is barred by Georgia law. There is no Georgia law barring First National Cornelia Corporation from owning a controlling interest in another business corporation which in turns owns and operates armored cars. See Ga. Code § 22-202. *Thus, there is nothing in Georgia law to prevent a state bank from using an armored car service owned and operated by a non-bank subsidiary of a one-bank holding company*

—from doing, in other words, precisely what petitioner seeks to do.[12]

Thus, to enjoin petitioner national bank from using a service which state banks in Georgia are free to use would create the very competitive inequality this Court was attempting to avoid in *Plant City*. This Court, after all, was not demoting national banks, making them subservient to state banks. It was not creating two levels of competition, with state banks on the top level enjoying rights, services, facilities and advantages which are denied to national banks. It was instead *equalizing* the two types of banks insofar as their ability to compete is concerned, making certain that each, *if it chooses*, can take advantage of all the

[12] The District Court and the Fifth Circuit Court of Appeals have relied on the Georgia statute prohibiting branch banking (Ga. Code § 13-204.1) to deny petitioner the declaratory relief requested below. Yet that statute is silent on the question of the legality under Georgia law of the particular organizational structure involved here. There are no Georgia state court decisions on the question. Even though the Georgia Superintendent of Banks maintains that a one bank holding company controlling a state bank could not also control another company which ran an armored car service, the simple answer to his position is the same as that given in *Leuthold* v. *Camp*, *supra*, where the court held that "if the administrator of the state law sees fit to deprive the state banks of rights which the [state] statute law gives them, the resulting inequality is created by administrative fiat and not by statute law" (273 F. Supp. at 701). In other words, it is not the view of the state Superintendent that controls but rather the actual provisions of the controlling state statutes. And we submit that no statute in Georgia in any way prohibits a one-bank holding company that controls a state bank from also controlling a non-bank armored car subsidiary, nor the subsidiary from operating such armored cars. In this regard the Court should note that 12 U.S.C. § 36(c) refers to the "statute law of the state" as the source for competitive equality purposes of what state banks can do, and not to the views of any single official.

services available to the other.[13] The fact that state banks may choose not to avail themselves of a particular service is irrelevant; it is the availability of that service that counts, and here the state banks have available to them precisely what petitioner has.

In his written opposition in the Fifth Circuit to petitioner's application for a stay of the District Court's order, the state Superintendent of Banks stated that "neither appellee has suggested that the typical activities of a legitimate armored carrier constitute branch banking" (p. 2). While that may have been the position of appellees-respondents, it very definitely was not the position of the District Court, and it is the court's order that has held petitioner in contempt. As the quotation in the footnote makes clear beyond question, the District Court ruled that *any* armored car messenger service not paid for by customers would be illegal, regardless of who operated it, so long as it picked up deposits to be transported to a bank.[14] Of

[13] In fact, in a recent case concerning the relationship between 12 U.S.C. § 36(c) and 12 U.S.C. § 30, the Third Circuit, after a review of this Court's applications of the doctrine of competitive equality up to and including *Plant City*, concluded that "as the foregoing indicates, the Supreme Court has been circumspect in its application of the competitive equality doctrine." *Ramapo Bank* v. *Camp*, 425 F. 2d 333, 346 (3d Cir. 1970).

[14] THE COURT: I don't think there is any question if Brinks operated under an exclusive contract with the First National Bank of Cornelia and performed these same services, I would reach exactly the same decision.

MR. PRETTYMAN: Well, that is what confuses me—the emphasis on the word "exclusive." It would make a difference in your honor's mind if Brinks did this for several banks?

THE COURT: Yes. If it was a service available to customers, as the agent of the customers. In other words, if there was a parcel delivery service but available to the general public to take deposits to any bank they wished and in a certain territory, then, I think

course, the exception the District Court carved out (where the customer himself retains and pays for the service) is quite unique in this country and would be prohibitive in cost for small merchants.[15] The District Court was really making illegal "the typical activities" of armored car carriers. The practical effect of its ruling is that Brinks Incorporated, Wells Fargo Protective Services, Inc., the Armored Carrier Corporation and hundred of other independent armored car companies now operating in this country will have to cease or sharply curtail their present operations. The

you've got a different question. You got a Public Service Commission question under those circumstances. Well, just suppose that Brinks announced tomorrow that all over the State of Georgia they would now operate a facility that allowed customers who were a distance from their banks to transport deposits and to have checks cashed at a certain fee paid by the customer to Brinks. If this were a service available to the general public, it could possibly not constitute banking.

MR. PRETTYMAN: Even though Brinks were to deliver to a number of banks, if the banks themselves retained Brinks and paid for that service, then, it would constitute banking?

THE COURT: In my opinion, it would. • • • [Hearing before Judge Smith on January 13, 1970, pp. 23-24.]

[15] In their opposition to petitioner's application for a stay of the District Court's order addressed to Mr. Justice Black, the respondent banks asserted that "The District Court enjoined only the providing of the same off-premises banking services as existed in *Plant City* by a bank, *at its expense* and to its customers only, whereby withdrawals are delivered, cash and checks picked up for deposit or checks exchanged for cash at a customer's place of business" (p. 5; emphasis added). If this had indeed been the District Court's ruling, there would have been no finding of contempt, because the subsidiary of the holding company and not petitioner paid for the service between January 15, when the subsidiary took over the armored cars, and January 25, when the service ceased altogether. As shown above, however, the District Court did not treat the service as illegal only if paid for by the bank, but rather treated the service as legal only if paid for by the customers.

impact, in view of the millions upon millions of dollars transported between customers and banks in this country every day, simply staggers the imagination and finds no justification whatever in Section 36 or in the *Plant City* opinion.

The seriousness of the situation ranges far beyond armored cars. Section 36 defines a branch not only in terms of receiving deposits but also in terms of paying checks and lending money. Virtually every grocery store cashes checks. Every small loan company lends money. If the mere receipt of a deposit—regardless of the nature of the facility that receives that deposit—converts the facility into a branch, it follows that any facility which cashes a check or lends money is also a branch. Thus, the local A&P store becomes a branch bank. Any small town loan company becomes a branch bank. In fact, the only place in Georgia (and in every other state that prohibits or restricts branch banking) where a check could be cashed or a loan obtained would be a state or national bank. We respectfully submit that this Court could not possibly have intended any such result in the *Plant City* case.

We should add a final word about why petitioner has taken the route it has. Armored car companies such as Brinks and Wells Fargo have stated both privately and on the public record that they will not operate in most of the area served by petitioner. Petitioner feels an obligation to its customers in this area. Of the ten counties covered by the armored truck service of the holding company's subsidiary, every one is located in Appalachia, one of the most destitute sections of the United States. The hundreds of businesses served by these trucks are almost exclusively small ones, and most are located in rural or mountain areas from five to

twenty miles away from the nearest town and the nearest bank. It is absolutely essential for many of the people who run these businesses to be continually at their places of work during business hours. Some, for example, operate rural, one-man grocery stores. If the proprietors of these stores are forced to take their money to the bank themselves, they will literally have to close down their businesses in order to make the trip. The armored truck service provided by the holding company's subsidiary to the individuals conducting these businesses is thus vital to their continued economic well-being. But it is also vital to their personal safety as well.[16]

[16] This was asserted time and again by a number of petitioner's customers at a hearing before the Georgia Public Service Commission on January 27, 1970. File No. 5 M C A 8665, Dkt. No. 4028-M, at 10-11, 32, 47, 48, 69. The hearing was on an application for a Class M Certificate of Public Convenience and Necessity filed by an independent truck owner to operate an armored car service for any and all banks that sought the service in northern Georgia. The application resulted in part from a contract entered into by the truck owner and petitioner on January 10, 1969, when petitioner's officers were seeking various legal alternative methods of retaining an armored car service for the bank's customers. It is not without significance that representatives of Brinks and Wells, Fargo testified at this hearing that they either did not operate in northern Georgia at all or did so only "spasmodically," and that surveys showed it would not be economically feasible for them to operate there (*id.* at 96-105, 110-112). As one of them said, "We can't just pick out the grocery stores, or the service stations, or the banks or whatever it might be" (*id.* at 103)—the very service provided by petitioner prior to the District Court's order. It is also interesting that while each of these witnesses testified at first that they considered a service between a bank and its customers illegal, cross-examination revealed that this was precisely the type of operation they themselves were carrying on in some instances (*id.* at 98, 102, 115). Moreover, both Brinks and Wells, Fargo regularly operate between banks (*id.* at 94, 104, 110-111), which of course receive deposits and cash checks between themselves just as surely as do a bank and its business customers.

CONCLUSION

In summary, the injunction against petitioner was a proper one under the *Plant City* doctrine only insofar as it enjoined the bank itself from operating an armored car messenger service. That service, when owned and controlled by the bank, was branch banking and therefore illegal in Georgia. But to extend that injunction to a messenger service owned, controlled and operated by an entirely different company—one that is not a bank—is a gross distortion of federal law and of this Court's decision, and is in conflict with rulings in other circuits. We respectfully urge this Court to grant certiorari; to settle the important issues raised in the foregoing petition as they relate to national banking practices throughout the United States;[17] to reverse the judgment of the Fifth Circuit Court of Appeals; and to direct that court to vacate the District Court order entered against petitioner insofar as it prohibits the Parent Messenger Service Corporation from operating

---

[17] This Court should note that similar controversies over the use of armored car subsidiaries of bank holding companies have already begun elsewhere. For example, on July 2, 1970, an independent armored car service sued to enjoin the operation of a similar service by a subsidiary of a holding company which also controlled a national bank, on the grounds that operation of the service constituted branch banking in violation of state law. *American Courier Corporation* v. *The Wachovia Corporation*, Civ. C-135-WS-70, M.D.N.C., 1970.

an armored car messenger service in the manner outlined above.

Respectfully submitted,

Joseph A. Ginnas
P. O. Box 489
Cornelia, Georgia 30531

E. Barrett Prettyman, Jr.
Peter F. Rousselot
Hogan & Hartson
815 Connecticut Avenue
Washington, D.C. 20006

Attorneys for Petitioner

APPENDIX

APPENDIX A

12 U.S.C. § 36. Branch Banks

The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:

(a) A national banking association may retain and operate such branch or branches as it may have had in lawful operation on February 25, 1927, and any national banking association which continuously maintained and operated not more than one branch for a period of more than twenty-five years immediately preceding February 25, 1927, may continue to maintain and operate such branch.

(b)(1) A national bank resulting from the conversion of a State bank may retain and operate as a branch any office which was a branch of the State bank immediately prior to conversion if such office—

(A) might be established under subsection (c) of this section as a new branch of the resulting national bank, and is approved by the Comptroller of the Currency for continued operation as a branch of the resulting national bank;

(B) was a branch of any bank on February 25, 1927; or

(C) is approved by the Comptroller of the Currency for continued operation as a branch of the resulting national bank.

The Comptroller of the Currency may not grant approval under clause (C) of this paragraph if a State bank (in a situation identical to that of the national bank) resulting from the conversion of a national bank would be prohibited by the law of such State from retaining and operating as a branch an identically situated office which was a branch of the national bank immediately prior to conversion.

(2) A national bank (referred to in this paragraph as the "resulting bank"), resulting from the consolidation of a national bank (referred to in this paragraph as the "national bank") under whose charter the consolidation is effected with another bank or banks, may retain and operate as a branch any office which, immediately prior to such consolidation, was in operation as—

(A) a main office or branch office of any bank (other than the national bank) participating in the consolidation if, under subsection (c) of this section, it might be established as a new branch of the resulting bank, and if the Comptroller of the Currency approves of its continued operation after the consolidation;

(B) a branch of any bank participating in the consolidation, and which, on February 25, 1927, was in operation as a branch of any bank; or

(C) a branch of the national bank and which, on February 25, 1927, was not in operation as a branch of any bank, if the Comptroller of the Currency approves of its continued operation after the consolidation.

The Comptroller of the Currency may not grant approval under clause (C) of this paragraph if a State bank (in a situation identical to that of the resulting national bank) resulting from the consolidation into a State bank of another bank or banks would be prohibited by the law of such State from retaining and operating as a branch an identically situated office which was a branch of the State bank immediately prior to consolidation.

(3) As used in this subsection, the term "consolidation" includes a merger.

(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and

operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. In any State in which State banks are permitted by statute law to maintain branches within county or greater limits, if no bank is located and doing business in the place where the proposed agency is to be located, any national banking association situated in such State may, with the approval of the Comptroller of the Currency, establish and operate, without regard to the capital requirements of this section, a seasonal agency in any resort community within the limits of the county in which the main office of such association is located, for the purpose of receiving and paying out deposits, issuing and cashing checks and drafts, and doing business incident thereto: *Provided*, That any permit issued under this sentence shall be revoked upon the opening of a State or national bank in such community. Except as provided in the immediately preceding sentence, no such association shall establish a branch outside of the city, town, or village in which it is situated unless it has a combined capital stock and surplus equal to the combined amount of capital stock and surplus, if any, required by the law of the State in which such association is situated for the establishment of such branches by State banks, or, if the law of such State requires only a minimum capital stock for the establishment of such branches by State banks, unless such association has not less than an equal amount of capital stock.

(d) The aggregate capital of every national banking association and its branches shall at no time be less than the aggregate minimum capital required by law for the establishment of an equal number of national banking associations situated in the various places where such association and its branches are situated.

(e) No branch of any national banking association shall be established or moved from one location to another without first obtaining the consent and approval of the Comptroller of the Currency.

(f) The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

(g) This section shall not be construed to amend or repeal sections 601-605 of this title, authorizing the establishment by national banking associations of branches in foreign countries, or dependencies, or insular possessions of the United States.

(h) The words "State bank," "State banks," "bank," or "banks," as used in this section, shall be held to include trust companies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of State laws.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

Civil Action Number 1191

W. M. JACKSON, Superintendent of Banks of the State of Georgia, *Plaintiff*

and

THE FIRST NATIONAL BANK OF GAINESVILLE, ET AL., *Plaintiff Intervenors*

v.

FIRST NATIONAL BANK OF CORNELIA, Cornelia, Georgia, *Defendant*

and

WILLIAM B. CAMP, Comptroller of the Currency of the United States, *Defendant Intervenor*

On January 13, 1970, the First National Bank of Cornelia, Cornelia, Georgia (hereinafter referred to as Cornelia Bank) filed its complaint in this Court for declaratory relief. The relief sought in said complaint, being so closely related to the issues already decided in the above-stated case, the Court directed that the complaint be given the same number as the above-stated case and that the issues raised by the complaint be treated as a subsequent phase of the above-stated case.

The Court ordered a hearing in the matter on January 23, 1970, and having heard evidence and argument of counsel for the parties, the Court enters the following:

FINDINGS OF FACT

On October 21, 1968, this Court entered an injunction against Cornelia Bank enjoining it, its officers, agents,

servants, employees and attorneys, and those persons in active concert or participation with them from providing armored car messenger service which was the subject matter of the litigation in this case.

Said injunction was stayed by a Justice of the Supreme Court of the United States pending the judgment of the Supreme Court in related litigation, to wit: First National Bank in Plant City, Florida v. Dickinson, 400 F.2d 548 (5th Cir. 1968) ——— U.S. ——— (No. 19634, December 9, 1969).

Said stay was dissolved and the injunction of this Court became effective at midnight January 20, 1970, by previous order of this Court.

Concurrently, the plaintiff intervenors have filed an application for contempt against the Cornelia Bank and its principal officers.

On January 21, 22, and 23, 1970, Cornelia Bank, in concert with others referred to in its complaint for declaratory relief, has provided messenger service pursuant to the "arrangements outlined" in the complaint for declaratory relief whereby a separate corporation controlled by the newly-created parent holding company of plaintiff has undertaken the operation of an armored car messenger service on behalf of the Bank. The parties referred to in said complaint have acted in concert with Cornelia Bank in providing said messenger service, and said parties had actual notice of the effectiveness of this Court's injunction as of midnight January 20, 1970.

At the hearing, it was stipulated that the Parent Messenger Service corporation, as subsidiary corporation for First National Cornelia Holding Company is (1) carrying on the same activities as those engaged in by the original bank-owned armored car messenger service, and specifically that it is receiving funds for deposit in and paying "written orders" against accounts at the First National Bank

of Cornelia and (2) that such activities are carried on exclusively for customers of the First National Bank of Cornelia and such service is not available to the general public or to other banks.

CONCLUSIONS OF LAW

Declaratory Judgment

The court is of the opinion that the activities presently conducted clearly constitute "branch banking" within the meaning of the *Dickinson* decision. As such, they are prohibited by 12 U.S.C. § 36(f) and Georgia Code § 13-204.1 except upon bank premises as defined by the state statute. The fact that they are now performed by a sister subsidiary of the Holding Company controlling the Cornelia Bank is of no avail as this contractual arrangement merely accomplishes indirectly what the bank is prohibited from doing directly. Nor is the fact that bank holding companies in Georgia have been permitted to engage in other activities such as real estate, stock investments, life insurance, etc. persuasive. The point is that none of those activities constitute "branch banking" as now defined, but rather relate to non-banking functions.

It is, therefore, concluded that the providing of an armored car messenger service pursuant to the arrangements outlined in the petition and amplified at trial, does violate the injunction of this court originally entered October 21, 1968, and made specifically effective by special order of this court as of midnight January 20, 1970. Accordingly, the declaratory judgment sought by Cornelia Bank's petition is denied.

Contempt

Having determined that the parties are in disobedience of the court's order, it is incumbent upon the court to fashion a decree which will insure compliance. The intervenors insist upon the imposition of compensatory fines

together with attorneys' fees and costs and, by direction of the court, the determination of such penalties for such actions is deferred for briefing and further order of the court. However, the question at hand is compliance hereafter by the First National Bank of Cornelia and its officers with the orders of the court.

The matter is not free of procedural and substantive difficulty. The powers of the court under 18 U.S.C. § 401 in civil and criminal contempt proceedings are subject to a variety of interpretations. However, as stated, the court is not now concerned with sanction for past actions, but with the orderly compliance hereafter with the court's order. In this respect, it is clear that courts possess inherent power to enforce their lawful decrees through the use of coercive sanctions in civil contempt proceedings, including imprisonment, so long as the sanctions are sufficiently "tied" to producing compliance with the decree. Shillitani v. United States, 384 U.S. 364 (1966); Scott v. Hunt Oil Co., 398 F.2d 810 (5th Cir. 1968); Clark v. Boynton, 362 F.2d 992 (5th Cir. 1966); Cliett v. Hammonds, 305 F.2d 565 (5th Cir. 1962); Philadelphia Marine Trade Ass'n v. Int. Longshoremen's Ass'n, Local 1291, 368 F.2d 932 (3d Cir. 1966).

Such is the situation here. It has been found that the Cornelia Bank has already disobeyed the court's previous order. In order to prevent future disobedience, it is necessary to invoke such sanctions prospectively. After more than two years of litigation between these parties, this action seems appropriate.

It Is Considered, Ordered and Adjudged that the First National Bank of Cornelia, Cornelia, Georgia, its officers, agents and employees together with all parties acting in concert therewith directly or indirectly, including but not limited to the First National Cornelia Corporation and The Parent Messenger Service Corporation, a Delaware corporation authorized to do business in Georgia and in

this District, cease and desist from the operation of the armored car messenger service described herein forthwith and no later than midnight, Sunday, January 25th, 1970; failing which the President and principal officer of said Bank shall be committed to the custody of the United States Marshal under an appropriate order of the court until such time as he complies with the court's orders of October 21, 1968, January 19, 1970, and this date and purges the Bank of such contempt. The court specifically reserves the right to impose any other sanction as may be necessary to effectuate the present orders of the court.

To this end, it is directed that the First National Bank of Cornelia, or its principal officer, or its attorney file with the court on or before January 28th, 1970, a statement in affidavit form describing and attesting to the procedures and steps taken to comply with this order.

APPLICATION FOR STAY

The movant having duly requested a stay of this order pending appeal, the same is denied and refused.

IT IS SO ORDERED.

This the 23rd day of January, 1970.

SIDNEY O. SMITH, JR.
United States District Judge

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 29142

W. M. JACKSON, Superintendent of Banks of the State of Georgia, *Plaintiff-Appellee*,

v.

THE FIRST NATIONAL BANK OF GAINESVILLE, ET AL., *Plaintiffs-Intervenors-Appellees*.

THE FIRST NATIONAL BANK OF CORNELIA, CORNELIA, GEORGIA, *Defendant-Appellant*,

v.

WILLIAM B. CAMP, Comptroller of the Currency of the United States, *Defendant-Intervenor*.

Appeal From the United States District Court for the Northern District of Georgia

(September 9, 1970)

Before BROWN, *Chief Judge*, GOLDBERG and CLARK, *Circuit Judges*.

CLARK, Circuit Judge: The First National Bank of Cornelia, Georgia (Bank) appeals from the denial by the District Court of its request for a declaratory judgment that it was not engaged in illegal branch banking through the use of an armored car service for its customers. A prior final adjudication of the district court established that this Bank's ownership and management of this same type of armored car service was a violation of Georgia branch banking laws. While the incorporation

of a one-bank holding company and the paper transfer of the armored car service to a counterpart subsidiary corporation of that holding company might terminate the violation in strict form, it changes not a whit of the substance. Since the whole scheme of maintaining competitive equality between the national and State banking systems looks to substance not form, we affirm.

The facts are stated most favorably to the appellee and full accord is given to the findings of fact and conclusions of law made by the district court in an earlier phase of this case in an order dated October 22, 1968, the appeal from which was voluntarily dismissed.[1] The order is now final and is the law of this case.

Approximately three years ago the Bank purchased three armored cars, which it illegally utilized as branch banks.[2] After the October, 1968 order of the trial court halted this activity, the Bank sought to do indirectly that which the district court had prohibited it from doing directly.

---

[1] Jackson v. First Nat'l Bank, of Cornelia, 292 F.Supp. 156 (N.D. Ga. 1968), *appeal dismissed*, No. 26938, February 5, 1970 (5th Cir.)

[2] Among the conclusions of law of the district court in its October, 1968 order, were these:

> "12. The operation of the above described 'armored truck bank messenger service' by defendant bank pursuant to paragraph 7490 of the Comptroller's Manual for national banks constitutes the operation of a branch bank outside the city limits of Cornelia, Georgia, and as such is illegal under Georgia law. Ga. Code § 13-203.
>
> "13. In addition, the operation of the above described 'armored truck banking messenger service' by defendant bank pursuant to paragraph 7490 of the Comptroller's Manual for national banks constitutes the carrying on, conducting or doing a banking business through banking facilities other than on the premises of the place of business of defendant bank and as such is illegal under Georgia branch banking law and under the policy it seeks to establish. G. . Code § 13-204.1." 292 F.Supp. at 161.

The Bank chartered two Delaware corporations, one as a holding company of the bank and the other as a subsidiary of the holding company. The Bank then transferred operation and ownership of the armored car service to the subsidiary corporation, which continued to operate the service exactly as it had been operated before solely on behalf of the bank for the benefit of the bank's customers. The armored car service charged the Bank's customers nothing and had no visible means of financial support. Obviously it lived in the land where profit is the lifeblood of business by drawing fiscal sustenance from the Bank, using the holding company as its artery.

The Bank instituted this action seeking a judgment declaring that the operation of the armored car service by the holding company did not constitute branch banking. The district court held:

> "The court is of the opinion that the activities presently conducted clearly constitute 'branch banking' within the meaning of the *Dickinson* decision. [*See infra.*] As such, they are prohibited by 12 U.S.C. § 36(f) and Georgia Code § 13-204.1 except upon bank premises as defined by the state statute. The fact that they are now performed by a sister subsidiary of the Holding Company controlling the Cornelia Bank is of no avail as this contractual arrangement merely accomplishes indirectly what the bank is prohibited from doing directly. Nor is the fact that bank holding companies in Georgia have been permitted to engage in other activities such as real estate, stock investments, life insurance, etc. persuasive. The point is that none of those activities constitute 'branch banking' as now defined, but rather relate to non-banking functions."

We agree. The ownership of the armored cars was never dispositive of the case. Every Georgia bank is forbidden

to use armored cars to extend the geographic reach of their banking facility in the form followed here. The transfer of ownership of the armored trucks from the Bank to a holding company did not affect the continued prohibition on the use of such trucks by the Bank to extend its area of banking operations.

In *First National Bank in Plant City* v. *Dickinson*, —— U.S. ——, 90 S.Ct. 337, —— L.Ed. 2d —— (1970), the Supreme Court made it quite clear that in determining whether activities by national banks violated the principle of "competitive equality" with State banks that form should not prevail over substance. In that case, the bank argued that its armored cars which picked up deposits were not engaged in branch banking because the depositors entered into a contract with the bank that the deposits delivered to the armored car would not be deemed received until they were physically delivered into the hands of the teller on the bank's premises. The court answered:

> We need not characterize the contracts as a sham or subterfuge in order to conclude that the conduct of the parties and the nature of their relations bring First National's challenged activities within the federal definition of branch banking. *Here, penetrating the form of the contracts to the underlying substance of the transaction*, we are satisfied that at the time a customer delivers a sum of money either to the armored truck or the stationary receptacle, the bank has, for all purposes contemplated by Congress in § 36(f), received a deposit. The money is given and received for deposit even though the parties have agreed that its technical status as a "deposit" which may be drawn on is to remain inchoate for the brief period of time it is in transit to the chartered bank premises. The intended deposits are delivered and received *as part of a large-scale continuing mode of*

conducting the banking business designed to bring basic bank services to the customers.

—— U.S. ——, 90 S.Ct. at 395 (emphasis added).

So too in this case the armored cars were used as "a continuing mode of conducting the banking business designed to bring basic bank services to the customers." The law of this case is that armored cars may not be operated as branch banks by federally chartered banks, because state banks may not engage in branch banking. Here, as in *Plant City*, we don't need to call a sham a sham. To ignore the substance of the operation of the armored cars in this case and allow rolling branch banks to be provided "on behalf of the bank" through the real or fictional largesse of a parent holding company, would illegally disrupt the competitive equality between federal and state banks in Georgia.

AFFIRMED.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1969

No. 29142

D. C. Docket No. CA 1191

W. M. JACKSON, Superintendent of Banks of the State of Georgia, *Plaintiff-Appellee*,

v.

THE FIRST NATIONAL BANK OF GAINESVILLE, ET AL., *Plaintiffs-Intervenors-Appellees*.

THE FIRST NATIONAL BANK OF CORNELIA, CORNELIA, GEORGIA, *Defendant-Appellant*,

v.

WILLIAM B. CAMP, Comptroller of the Currency of the United States, *Defendant-Intervenor*.

Appeal From the United States District Court for the Northern District of Georgia

---

Before BROWN, *Chief Judge*, GOLDBERG and CLARK, *Circuit Judges*.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said

District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendant-appellant pay to plaintiff appellee, the costs on appeal to be taxed by the Clerk of this Court.

September 9, 1970

Issued as Mandate: Oct. 1, 1970

A true copy

Test: Edward W. Wadsworth
Clerk, U. S. Court of Appeals, Fifth Circuit

By s Claudette Staiger
Deputy Oct. 1, 1970

New Orleans, Louisiana

INDEX

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Statute Involved	2
Question Presented	2
Statement	2
Argument	5
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Bankers & c. Co. v. Atlanta Chamber of Commerce, 177 Ga. 334, 170 S.E. 291 (1933) 5

Dickinson v. First National Bank in Plant City, 400 F.2d 548 (5th Cir. 1968) 3, 6

First National Bank in Plant City v. Dickinson, 396 U.S. 122 (1969) 3, 5, 6

Jackson v. First National Bank of Cornelia, 292 F. Supp. 156 (N.D. Ga. 1968) 3, 6

Jackson v. Long, 225 Ga. 227, 167 S.E.2d 583 (1969) 5

Statutes:

12 U.S.C. § 36 ..... 2, 5

Ga. Code § 13-204 ..... 2, 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 1067

FIRST NATIONAL BANK OF CORNELIA, CORNELIA, GEORGIA,

Petitioner,

v.

W. M. JACKSON, Superintendent of Banks of the State of Georgia

and

THE FIRST NATIONAL BANK OF GAINESVILLE, GEORGIA, ET AL.,

Respondents.

On Petition For A Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

BRIEF IN OPPOSITION FOR THE SUPERINTENDENT OF BANKS OF GEORGIA

OPINIONS BELOW

The opinion of the District Court is printed as Appendix B to the Petition. The opinion of the Court of Appeals is printed as Appendix C to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATUTE INVOLVED

Contrary to what is set out in the Petition, we believe the statutory provision involved is Ga. Code § 13-204, as follows:

> "No individual, partnership, person, firm, company, or voluntary association shall carry on or conduct a banking business in this State without being chartered or certificated and organized under the banking laws of this State or of the United States."

QUESTION PRESENTED

If a particular armored car service has been judicially determined to be a banking business, will a transfer in ownership of that service void the judicial determination if the new owner continues the exact same service?

STATEMENT

This case originated in October, 1967, as an application by the Respondent, Superintendent of Banks of the State of Georgia (hereinafter "Superintendent") to enjoin the operation of an armored car banking service being operated by the Petitioner, First National Bank of Cornelia (hereinafter "Bank of Cornelia") in violation of the branch banking provisions of 12 U.S.C. § 36. The service operated throughout northeast Georgia and portions of western North Carolina. Fourteen (14) competing national and state banks intervened as plaintiffs on the ground that the Bank of Cornelia's operation

was illegal competition and causing them irreparable damage. The U. S. Comptroller of the Currency intervened on behalf of the Bank of Cornelia.

Following the decision by the Fifth Circuit Court in *Dickinson v. First National Bank in Plant City*, 400 F.2d 548 (5th Cir. 1968), which held that a similar service in Florida violated state banking laws, the District Court in Georgia entered an order which held the Bank of Cornelia's armored car service to be a banking service in violation of Federal and State law and enjoined its further operation. *Jackson v. First National Bank of Cornelia*, 292 F. Supp. 156 (N.D. Ga. 1968), *appeal dismissed*, February 5, 1970, Fifth Cir. C.A. No. 26938. The Florida Bank sought and was granted a writ of certiorari by this Court which subsequently affirmed the Fifth Circuit in *First National Bank in Plant City v. Dickinson*, 396 U.S. 122 (1969). The Bank of Cornelia appealed its adverse decision to the Fifth Circuit which stayed the appeal pending this Court's decision in *Plant City*. However, because Circuit Justice Black granted a stay of the District Court injunction, the Bank of Cornelia continued to operate its armored car service during this period of time.

Although this Court announced its decision in the *Plant City* case on December 9, 1969, the Bank of Cornelia continued operation of the armored car service until January 20, 1970, on the ground that the decision of this Court had not yet become a judgment. Following a denial of the Florida Bank's petition for rehearing in the *Plant City* case, the Georgia District Court reinstated its original injunction against the Bank of Cornelia's armored car service.

On the next day, the Bank of Cornelia transferred the armored car banking service operation to a subsidiary corporation which was established to operate the service. In all other respects, the service remained the same. Upon announcement of this Court's decision in *Plain City*, the owners of the Bank of Cornelia had chartered two Delaware corporations, one a holding company for the Bank and the other a subsidiary to operate the armored car banking service. When time ran out for the Bank of Cornelia, the armored car service was transferred to the subsidiary corporation.

Interestingly, it was the Bank of Cornelia which sought the sanction of the District Court for this arrangement by bringing a petition for declaratory ruling. The Comptroller of the Currency opted out from this phase of the case below and has taken no active part in the proceedings now on appeal. After a hearing on January 23, 1970, the District Court ruled that the transfer of the service still violated the banking laws and the service was being provided in direct violation of the Court's original order of October 21, 1968. The Court also found in favor of the intervenor banks' application for contempt, while deferring determination of any penalties for the contempt until a further hearing. The District Court thus ended the operation of this armored car banking service.

The Court of Appeals affirmed the judgment of the District Court. (Appendix B of Petition, page 15a).

ARGUMENT

There is no important question of federal law involved in this case and the decision below is clearly correct.

The Superintendent refuses to be misled by the improper and irrelevant introduction into this case of the "branching" question by the Bank of Cornelia. (Bank's Petition, First Question Presented). We do not contend that the armored car banking service as now operated is a "branch" of the Bank of Cornelia within the meaning of 12 U.S.C. § 36. Neither will the Superintendent be misled by the lengthy discussion and citation of cases on the fanciful issue of whether legitimate holding companies are legal and proper in Georgia. Of course they are.

The issue in this case is whether the activities of this armored car service constitute the business of banking under the State laws of Georgia. If they do, then a national bank could not operate the service because of the restrictions in 12 U.S.C. § 36(f) as interpreted by *First National Bank in Plant City v. Dickinson*, 396 U.S. 122 (1969). Neither could a Delaware private corporation operate this service because no one can do a banking business in Georgia without first being chartered by the proper authority either as a national bank or a state bank.[1] The statement by the Bank of Cornelia that this

---

[1] Ga. Code § 13-204 provides:

"No individual, partnership, person, firm, company, or voluntary association shall carry on or conduct a banking business in this State without being chartered or certificated and organized under the banking laws of this State or of the United States." See *Jackson v. Long*, 225 Ga. 227, 167 S.E.2d 583 (1969); *Bankers & c. Co. v. Atlanta Chamber of Commerce*, 177 Ga. 334; 170 S.E.2d 291 (1933).

banking operation can be conducted in Georgia by a private Delaware corporation is simply wrong, as a matter of Georgia law. (Petition, page 15).

This Court and the Fifth Circuit Court have each decided that the operation of a similar armored car banking service by a Florida bank would be a banking service securing for the bank an unfair and illegal competitive advantage over competing national and state banks. *Dickinson v. First National Bank in Plant City*, 400 F.2d 548 (5th Cir. 1968), *aff'd*, 396 U.S. 122 (1969).

It is the law of this case that the activities of this armored car service constituted a banking business by the Bank of Cornelia. *Jackson v. First National Bank of Cornelia*, 292 F. Supp. 156, 159-160, Conclusion of Law No. 2 (N.D. Ga. 1968), *appeal dismissed*, February 5, 1970, Fifth Cir. C.A. No. 26938.

The Bank of Cornelia admits that only the ownership of the service has been changed, presumably to protect the innocent. In every other respect, the operation of the armored car banking service has remained the same. (January 23, 1970 Transcript ("T") 10; January 23, 1970 District Court order, p. 3.) Is the change in ownership sufficient, by itself, to allow the armored car banking service to continue its banking operations in violation of well established law?

The Superintendent contends that it matters not who owns the armored car service. What does matter is that the service is a banking business which has not been properly qualified as a bank. This is a matter of State law and not a proper decision for review by this Court.

No one in this case can argue that the banking func-

tions carried on by the armored car service are incidental to some other legitimate business purpose. The service was conceived with one purpose in mind, namely to further the banking interests of the Bank of Cornelia. The business of banking is its sole reason for existence. The Bank of Cornelia refuses to allow any other bank to make use of this service. (T, 4). The service is also denied to any member of the general public who is not a customer of the Bank of Cornelia. (T, 4). If the Bank of Cornelia stopped operations today, the armored car service would die a simultaneous death.

Doubtless there are cases, as the Bank of Cornelia asserts, where a court has found a particular set of facts did not constitute the business of banking. Our task is to determine whether the facts in this case justify a finding of the armored car service as a banking business.

Based on the previous judicial determination and the facts as presented by this appeal, we submit that there can be little doubt that the operation of this armored car service is a banking business.

It is quite understandable why the Bank of Cornelia has expended such a considerable amount of time, money, legal talent and effort to continue the armored car service. There is no doubt that the Bank has gained a great advantage over its competitors by this operation. However, the Bank overstates its case and the implications of this case by raising the spectre that an adverse decision will destroy the armored car industry in America. Neither the Superintendent of Banks nor the intervening banks in this case has ever implied that the present activities of a typical armored car company would run afoul of Georgia banking law. A comparison of the methods

of operation of the Cornelia armored car service as shown by this case with a typical armored car service will reveal the fallacy of this contention and we will waste no more time on this matter.

Suffice it to say that the cashing of a check by a grocery store is not a banking business and to suggest that an adverse decision will lead to this conclusion is ludicrous at best.

The effect of a decision adverse to the Bank of Cornelia would be important because it will hopefully end this armored car banking operation and return competitive equality to the banking business in northeast Georgia and western North Carolina.

The artificial attempt by the Bank of Cornelia to create a conflict between circuits cannot stand scrutiny. As we have pointed out previously, the actions of the armored car service in this case constitute a banking business. Under Georgia law, no corporation can do a banking business without being properly chartered under the banking laws of Georgia or the United States. The Bank of Cornelia does not, and indeed cannot, cite any Federal Court decision which would allow a private corporation to operate a banking business in violation of state law. In both of the cases relied on by the Bank of Cornelia, the additional banking operation had qualified under the law as a bank. As we have shown previously, it is the law of this case that the operations of this armored car service constitute a banking business, and by conducting the exact same operations, the subsidiary is operating in direct violation of Georgia law.

CONCLUSION

In the area of banking, the State of Georgia has decided that the best road to a prosperous economy is through the encouragement and growth of local independent banking units. Especially is this so in the area described by the Bank of Cornelia as "one of the most destitute sections of the United States." The State's policy was reached after long and laborious debate and is subject to continuous modification through the legislative process. The State has a strong interest in maintaining this policy and we hope this Court will realize that this case rests on an interpretation of State law and is not the type of case envisioned as worthy of review by this Court. This armored car service is a banking business being operated in violation of State law. We respectfully urge this Court to deny the Petition for Certiorari.

Respectfully submitted,

ARTHUR K. BOLTON
Attorney General

HAROLD N. HILL, JR.
Executive Assistant
Attorney General

ROBERT J. CASTELLANI
Assistant Attorney General

Attorneys for the
State of Georgia

PLEASE ADDRESS ALL
COMMUNICATIONS TO:

ROBERT J. CASTELLANI
Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334
Telephone (404) 656-3340

BRIEF FOR RESPONDENT

TABLE OF CONTENTS

	Page
Argument	1
Conclusion	6

Table of Cases Cited

First National Bank in Billings v. First Bank Stock Corporation, 306 F. 2d 973 (9th Cir. 1962) 5

First National Bank in Plant City, Florida v. Dickinson, 296 U. S. 122 (1969) 1, 2, 3, 4, 5

Miscellaneous Cited

12 U. S. Code, Section 36 3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. .....

FIRST NATIONAL BANK OF CORNELIA, CORNELIA, GEORGIA,
Petitioner,*

v.

W. M. JACKSON, Superintendent of Banks of the State of Georgia,
and
THE FIRST NATIONAL BANK OF GAINESVILLE, GEORGIA, et al.,
Respondents.

RESPONDENTS' BRIEF

Petitioner, First National Bank of Cornelia, urges that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit to review that Court's opinion and judgment entered on September 9, 1970, the text of which is set forth as Appendix C to the petitioner's brief. Review is sought of the Fifth Circuit's ruling that operation of an armored car messenger service by a bank holding company on behalf of a bank is illegal branch banking.

Certiorari is sought because of a purported conflict in the Fifth Circuit's decision in the instant case with that of other circuits and because of a purported conflict with this Court's decision in **First National Bank in Plant City, Florida v. Dickinson,** 296 U. S. 122 (1969) (hereinafter referred to as **Plant City**). Respondents, fourteen (14)

state and national banks located in Northeast Georgia and North Carolina, strongly contend that the Fifth Circuit's decision is in complete accord with **Plant City** and that there is no conflict with other circuits on the same matter.

There is no question but that the original facts of the instant case were squarely in point with those in **Plant City**.[1] In both cases the bank owned and operated an armored car messenger service in violation of state and federal branch banking laws. Four days prior to the entry of the final judgment in **Plant City**, First National Bank of Cornelia parried with an elaborate scheme whereby ownership and operation of the armored car messenger service was turned over to a sister subsidiary of First National Bank of Cornelia's holding company. No real change of substance was made. The same trucks continued to roll over the same route using the same employees, forms, etc. The messenger service continued to operate solely on behalf of the bank, remained closed to the public and transported money only for First National Bank of Cornelia's customers,[2] free of charge.[3]

---

[1] Both the Comptroller of the Currency and First National Bank of Cornelia voluntarily withdrew their appeals to the Fifth Circuit Court of Appeals following this Court's **Plant City** decision.

[2] This was stipulated by First National Bank of Cornelia at the District Court hearing on January 23, 1970. See Appendix to Petitioner's Brief, page 6a.

[3] The Fifth Circuit very cogently observed the total financial dependency of the armored car subsidiary as follows:

> "The armored car service charged the bank's customers nothing and had no visible means of financial support. Obviously it lives in the land where profit is the life blood of business by drawing fiscal sustenance from the bank, using the holding company as its artery" (p. 12a of Petitioner's Brief).

This observation is uncontroverted in the record. While petitioner's brief alludes to independent income of the holding company (p. 9), there is no evidence in the record that such is the case, and any statements to this effect should be ignored.

The thrust of petitioner's argument is that formation of a separate corporate entity through whom ownership of the armored cars is maintained removes the case from the rationale of **Plant City**. Both the District Court and the Fifth Circuit refused to be drawn into such an obviously ostrich-like stance. Judge Jones, speaking for the Fifth Circuit, responded:

> "While the incorporation of a one bank holding company and the paper transfer of the armored car service to a counterpart subsidiary corporation of that holding company might terminate the violation in strict form, it changes not a whit of the substance. Since the whole scheme of maintaining competitive equality between the national and state banking systems looks to form not substance, we affirm" (Appendix to Petitioner's Brief, page 10a).

In holding that the McFadden Act's[4] policy of maintaining competitive equality between state banks and national banks requires an examination of substance and not form, the District Court and the Fifth Circuit were assiduously following this Court's decision in **Plant City**. This Court's attitude in **Plant City** is most clearly shown in the following remarks of Chief Justice Berger:

> "Because the purpose of the statute is to maintain competitive equality, it is relevant in construing 'branch' to consider not merely the contractural rights and liabilities created by the transaction, but all those aspects of the transaction that might give the bank an advantage in its competition for customers. Unquestionably a competitive advantage accrues to a bank that **provides** the service of receiving money for deposit at a place away from its main office; the convenience to the customer is unrelated to whether the

[4] 12 U. S. Code, Section 36.

relationship of debtor and creditor is established at the moment of receipt or somewhat later." 90 S. Ct. at 345. (Emphasis supplied.)

There is no question but that the Parent Messenger Service Corporation operates its armored car messenger service on behalf of the First National Bank of Cornelia. The service is not for hire, is not open to the general public and serves only First National Bank of Cornelia. (Transcript of January 23, 1970, hearing before the U. S. District Court, pp. 4, 10, 15.)

The record also amply establishes that the armored car messenger service is **provided by**, if not technically operated by, the First National Bank of Cornelia. This was the situation before the creation of the subsidiary messenger service corporation; it clearly is still so.

The situation here clearly meets the acid test of impermissible activities enunciated in **Plant City**. First National Bank of Cornelia cannot operate an armored messenger service directly. Neither can it **provide** this service for its customers indirectly through the veil of a sister corporation. In either case, the bank gains a competitive advantage over state banks which are not permitted to engage in such activities.[5]

The Fifth Circuit decision prohibiting such activities on behalf of First National Bank of Cornelia is in keeping both with the spirit and the letter of **Plant City**.

---

[5] This would be in violation of Georgia Code, Section 13-204.1, which provides as follows:

"13-204.1. Banking business to be carried on only on premises of place of business.—No bank shall carry on or conduct or do a banking business in this State except on the premises of the place of business (banking house) established and operated under and pursuant to a permit from the Superintendent of Banks. A place of business for the doing of a banking business would include a parent bank, a branch bank, a bank office, or a bank facility. A banking business is the business which a bank is authorized by law to do (Acts 1967, pp. 105, 106)."

Petitioner also argues that the Fifth Circuit decision is in conflict with the decisions of other circuits, notably the District of Columbia Circuit and the Ninth Circuit. To so argue is to completely miss the point. The point is not whether the Fifth Circuit is in accord with other circuits, but whether the other circuits are in accord with this Court's **Plant City** decision. It is curious to note that every case cited by petitioner antedates **Plant City**. To the extent that these cases are in conflict with **Plant City**, it is they that must yield and not vice versa.

Still there is no need to be drawn into a tangential argument relative to a possible conflict between the instant case and the cases cited by petitioner. Supreme Court Rule 19 provides that certiorari may issue "where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter * * *." The simple fact is that the cases cited by petitioner are easily distinguishable.

In each cited case branch banking was attempted to be shown through common ownership, management or control of two or more banks. As petitioner suggests the cases do stand for the proposition that, at least prior to **Plant City**, this is not illicit branch banking. The distinguishing feature is that each case involved two or more banks that were completely separate economic, functional and legal entities.[6]

Each bank met its own minimum capital requirement for banks. Each bank was economically self-sufficient.

---

[6] Petitioner's argument seems to be that the armored car messenger service is permissible since it is done through a separate corporation. This approach was rejected in **First National Bank in Billings v. First Bank Stock Corporation**, 306 F. 2d 973 (9th Cir. 1962):

> "We do not agree with appellees that the fact that two banks are separate corporate organizations demonstrates conclusively that one is not a branch of the other. In the banking field, as elsewhere, courts have power to 'pierce the corporate veil' when the realities require it." Id. at 942.

Each bank could have existed without regard to the continued existence of the other. Each had its own characteristic type of operation, unrelated to the other.

Compare these facts with the facts at bar. The Parent Messenger Service Corporation owes its very existence to First National Bank of Cornelia. It is a mere handmaiden with no other reason for being than First National Bank of Cornelia and the service of that bank's customers. The two are a functional and economic unit. First National of Cornelia does business through the instrumentality of Parent Messenger Service Corporation.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Fifth Circuit correctly affirmed the District Court's denial of a declaratory judgment and that the First National Bank of Cornelia may not provide an armored car messenger service as outlined by the evidence. The petition for writ of certiorari should be denied.

Respectfully submitted

KENYON, GUNTER, HULSEY & SIMS

By WILLIAM B. GUNTER

By SAMUEL L. OLIVER

P. O. Box 1457
Gainesville, Georgia 30501
Attorneys for First National Bank of Gainesville, Georgia, et al.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1067

FIRST NATIONAL BANK OF CORNELIA, CORNELIA, GEORGIA, *Petitioner*,

v.

W. M. JACKSON, Superintendent of Banks of the State of Georgia

and

THE FIRST NATIONAL BANK OF GAINESVILLE, GEORGIA, ET AL., *Respondents*.

REPLY BRIEF

We need make only a few comments about the Brief of the respondent banks, because virtually all of the points made in that Brief have already been fully answered in our Petition.

The Brief twice assumes on page 4 that the armored car messenger service is provided by the bank itself.

But the unequivocal showing in the record is that this service is provided entirely by another company, The Parent Messenger Service Corporation, which in turn is owned by still a third company, The First National Cornelia Corporation.

The respondent banks also attempt to distinguish decisions in other circuits on the ground that they involved two or more banks which were "completely separate economic, functional and legal entities" (p. 5). Actually, the same is true here. But in the *Gidney* case,[1] to cite one example, the whole argument of the protesting plaintiff was that one bank had been formed by eight out of the nine directors of another bank for the specific purpose of avoiding the prohibition against branch banking. It is difficult to see why the two banks in that case were "completely separate economic, functional and legal entities" and the companies in the instant case were not.

The Brief of the Superintendent of Banks of Georgia takes the position that the issue of branch banking is not even involved in this case. He says, in fact: "We do not contend that the armored car banking service as now operated is a 'branch' of the Bank of Cornelia within the meaning of 12 U.S.C. § 36" (p. 5). Instead, says the Superintendent, the armored car service constitutes "the business of banking" (p. 5). Therefore, it makes no difference *who* operates the armored car service, since it is a "banking service" (p. 6) which cannot be carried out without being chartered as a bank (p. 5).

---

[1] *Camden Trust Co.* v. *Gidney*, 301 F.2d 521 (D.C. Cir.), *cert. denied*, 369 U.S. 886 (1962).

Several observations are in order concerning this unique approach.

First, we note that the respondent banks do not adopt it. Their brief makes no argument along this line. More to the point, the Court of Appeals, as we read its decision, did not adopt it either. It held that "The law of this case is that armored cars may not be operated as branch banks by federally chartered banks * * *" (App. B to Petition, p. 14a).

Secondly, we fail to see how the Superintendent can argue on the one hand that "it matters not who owns the armored car service" (p. 6) and on the other that "Neither the Superintendent of Banks nor the intervening banks in this case has ever implied that the present activities of a typical armored car company would run afoul of Georgia banking law" (p. 7). If the service is illegal regardless of who operates it, why is a Brinks or Wells Fargo armored car service perfectly proper?

But most importantly, if this Court were to reject our interpretation of the branch-banking statute, we submit that the proper disposition of this case, in the light of the Superintendent's position, would be a remand to the Court of Appeals with directions to retain jurisdiction until petitioner's parent company has made application to the Federal Reserve Board, and the Board has acted, under the newly-enacted "Bank Holding Company Act Amendments of 1970," 12 U.S.C. § 1841 *et seq.*

On December 31, 1970, following the filing of our Petition for a Writ of Certiorari on December 7, the Bank of Cornelia's parent company for the first time

became subject to these Amendments.[2] The Amendments allow the Federal Reserve Board to pass upon all acquisitions by registered bank holding companies. In the case of non-bank acquisitions, the Board must find that the activities carried on by the acquired company are "so closely related to banking * * * as to be a proper incident thereto" (12 U.S.C. § 1843(8)). If the Board so finds, the parent company is allowed to carry on the approved activities. Since the Georgia Superintendent of Banks takes the position that the activities involved here are not only "closely related" to banking but in fact are banking itself, we assume he would support our application to the Board.

The Georgia Superintendent blandly states that "the cashing of a check by a grocery store is not a banking business" (p. 8), but he fails to say why. The statute, 12 U.S.C. § 36(f), provides that the term "branch" shall be held to include any branch place of business at which, *inter alia*, deposits are received or checks are paid. If an armored car is a branch because it receives deposits, why is not a grocery store a branch because it pays checks?

Finally, the Georgia Superintendent states that the Comptroller of the Currency "opted out" from the current phase of this case "and has taken no active part in the proceedings now on appeal" (p. 4). The Superintendent fails to say why the Comptroller

---

[2] Like other companies now subject to the Act, the Bank of Cornelia's parent corporation has not registered under the Act because the Federal Reserve Board has not yet issued the required forms of regulations governing such registration. There can be no question, however, that the bank and its parent are in fact now subject to the Act's provisions.

"opted out." The reason is revealed in the following letter, which was made part of the record below:

THE ADMINISTRATOR OF NATIONAL BANKS
WASHINGTON, D. C. 20220

Jan. 21, 1970

Office of the
Comptroller of the Currency

Mr. E. Barrett Prettyman
Hogan & Hartson
815 Connecticut Ave., N. W.
Washington, D. C. 20006

Dear Mr. Prettyman:

This is in response to your letter to the Comptroller of January 16, 1970, concerning the complaint filed in the Northern District of Georgia captioned *First National Bank of Cornelia* v. *W. M. Jackson*. You advise that a hearing will be held on the issues raised by that complaint on January 23, 1970, and ask whether the Comptroller intends to be represented at that hearing.

It appears that 80 percent of the outstanding shares of First National Bank of Cornelia are or will be owned by First National Cornelia Corporation, a Delaware business corporation. First National Cornelia Corporation will own all or substantially all of the stock of another Delaware business corporation called The Parent Messenger Service Corporation. The Parent Messenger Service Corporation will conduct an armored car messenger service similar to that of Brink's, Inc. or Wells Fargo Protective Service, Inc., executing contracts with various businesses to transport funds as a messenger or agent for individual businesses to and from the First National Bank of Cornelia.

The Comptroller's Office does not intend to request the Department of Justice to represent it at

the hearing on Friday, January 23, 1970. Neither First National Cornelia Corporation nor its subsidiaries other than First National Bank of Cornelia are subject to the general administrative jurisdiction of the Comptroller's Office, and the Office therefore has not been called upon and does not have jurisdiction to approve or disapprove the operations of either First National Cornelia Corporation or The Parent Messenger Service Corporation.

Very truly yours,

ROBERT BLOOM
Chief Counsel

In other words, the Comptroller "opted out" because branching is no longer part of petitioner's operation.

For all of these reasons, certiorari should be granted and the judgment of the Court of Appeals reversed.

Respectfully submitted,

JOSEPH A. GRIGGS
P. O. Box 489
Cornelia, Georgia 30531

E. BARRETT PRETTYM[illegible], JR.
PETER F. ROUSSELOT
Hogan & Hartson
815 Connecticut Avenue
Washington, D. C. 20006

Attorneys for Petitioner